

In the
**United States
Circuit Court of Appeals
For the Ninth Circuit**

RAY McCURRY and JOHN WALL,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error

Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
DISTRICT OF MONTANA

Appearances:

JOHN L. SLATTERY,

United States Attorney.

RONALD HIGGINS,

Assistant United States Attorney.

WELLINGTON H. MEIGS,

Assistant United States Attorney.

Attorneys for Defendant in Error.

FILED

! OCT 10 1921
F. D. MONCKTON,
CLERK



In the
United States
Circuit Court of Appeals
For the Ninth Circuit

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

STATEMENT OF THE CASE

Plaintiffs in error are in default in that they have not served or filed within the time prescribed by the rules their brief herein, but it is deemed proper to set forth a statement of the case in the event the court should decide to overlook the infraction of the rules.

On October 28, 1920, an indictment in three counts was presented and filed in the District Court of the United States for the District of Montana, charging plaintiff in error with having made and fermented a certain mash fit for the production of spirits on prem-

ises other than a distillery duly authorized according to law; and with having failed and neglected to register a certain still, set up, which they had in their possession and custody; and with having carried on the business of distillers without having given the bond required by law. (R. 2-5), The plaintiffs in error pleaded not guilty, (R. 6), and were tried on January 17, 1921 (R. 6-7) and were found guilty as to counts two and three and not guilty as to count one. (R. 8.) On January 17, 1921, judgment was entered against plaintiffs in error, each receiving a sentence of nine months imprisonment, and McCurry being fined \$500.00 and costs and Wall being fined \$200.00 and costs (R. 8-9.) Subsequently plaintiffs in error served notice of motion for a new trial (R. 10-11), and on July 2, 1921, said motion was denied (R. 11-14,) On the same day the bill of exceptions was duly settled and allowed and filed (R. 14-28), and thereafter petition for writ of error and for supersedeas and bail was filed (R. 29-30); also an assignment of errors (R. 30-31.) An order was made allowing the writ of error and admitting to bail (R. 32), and a bond was filed by plaintiffs in error in support of the writ of error (R. 33-35.) Citation on writ of error was issued July 14, 1921 (R. 36-37); also writ of error (R. 38-39.) The court made answer to the writ of error (R. 40) and the certificate of the Clerk of the lower court to the transcript of record is appended (R. 41-42).

ARGUMENT

Four errors are assigned (R. 30-31.) The first is that the court erred in instructing the jury that evidence tending to show the probability of guilt of the defendants was sufficient to warrant conviction; second, that the court erred in instructing the jury that the burden was upon defendants (Plaintiffs in error) to show the registration of the still and the filing of the bond; third, that the court erred in refusing to give an instruction asked by the defendants; and, fourth, that the court erred in rendering and entering judgment against the defendants (plaintiffs in error).

I.

As to the third error assigned, it is sufficient only to call the attention of the court to the fact that the bill of exceptions does not disclose that the instruction set forth in the assignment of errors was offered by plaintiffs in error, or that any exception was saved to the refusal of the court, if the court did refuse, to give the same.

II.

As to the fourth error assigned, namely, that the court erred in rendering and entering judgment against the defendants, it is submitted that such an assignment is too general to warrant review by the court. See Collins v. United States, 219 Fed. 670, (C. C. A. 8th), p. 674, in which case there was an assignment of errors as follows:

“ . . . because the court erred in entering judgment herein against the defendant and in favor of the United States of America.”

The Circuit Court of Appeals said:

“This is too general to present a question for review. See Scholey v. Rew, 23 Wall. 331, 345, 23 L. Ed. 99; Texas and Pacific R. Co. v. Archibald, 170 U. S. 665, 668, 18 Supt. Ct. 777, 42 L. Ed. 1188.”

III.

The instructions given by the court with reference to reasonable doubt are clear and are in accord with the rules laid down by the weight of authority. We quote from the court's instructions:

“The defendants having plead not guilty, that imposes upon the Government the burden of proving to your satisfaction that they are guilty beyond a reasonable doubt before you can justly convict them.” (R. 17) you weigh the evidence against them and for them to determine whether or not that presumption of innocence is overcome, and to a degree that satisfies you that they are guilty beyond a reasonable doubt. (R. 17). Whenever the presumption of innocence has been overcome by the evidence to that degree that you are satisfied that they are guilty beyond a reasonable doubt, the presumption of innocence disappears from the case and it will be your duty to find them guilty, (R. 18.) When I say the Government must prove them guilty beyond a reasonable doubt, you take into consideration also the evidence that the defendants have submitted in their own behalf, and weighing it all together, considering it altogether determine whether or not they are guilty beyond a reasonable doubt. Remember that the proof before they can be found guilty is only that they are guilty beyond a reasonable doubt. Not beyond all doubt or any doubt, or a suspicion that after all they may be innocent, but only beyond a reasonable doubt. It is difficult to

define a reasonable doubt more clearly than those words themselves express. The Courts say that a reasonable doubt means that there is something in the evidence, or something lacking in the evidence, that causes you to pause, as honest jurors endeavoring to do justice between the accused and the Government and to say to yourself that you doubt the guilt of the defendants; but that is not enough; it must also cause you to go further and say to yourself as intelligent men that it is reasonable to doubt the guilt of the defendants. Another way to define reasonable doubt is that after you have reviewed all the evidence, if you have not an abiding conviction (that is to say, a judgment that persists in staying with you) that to a moral certainty (that is to say, to a high degree of probability) they are guilty, you have what the law terms a reasonable doubt, and are bound to acquit them. On the other hand, if after you have reviewed all the evidence you have settled judgment that persists in staying with you that to a high degree of probability the defendants are guilty, you have no reasonable doubt, and it is equally your duty to convict them. (R. 18-19)

The evidence is before you. The case goes to you now for you to make up your judgment. The Court will conclude as it began, that these defendants are presumed to be innocent, and that presumption requires that you acquit them unless after your review of all the evidence you believe it is overcome to a degree that satisfies you that they are guilty beyond a reasonable doubt; and if you are satisfied that they are guilty beyond a reasonable doubt it is your duty to convict them. (R. 25-26) The Court overlooked one matter. Counsel was arguing; he proceeded to lay down his view of the law that you could not convict on suspicion. That is true, Gentlemen of the Jury, but he went on to say that you could not convict on probabilities, and there the Court in-

terrupted him, and stated that that was not the law. That is not the law, because after all, all cases are determined upon probabilities. There is no such thing as absolutely proving the guilt of the defendants, and guilt never needs to be proven to an absolute certainty because that is impossible. *It needs only be proven to that high degree of probability that creates in your minds an abiding conviction to a moral certainty that he is guilty.* In this court you are dealing with the law of the United States. That law is that when you form from the evidence a judgment that persists in staying with you that to a high degree of probability the defendant is guilty, you have no reasonable doubt, the law is satisfied, and it is your duty to convict. (R. 26).

It is to be observed that plaintiffs in error excepted to only a detached portion of the instructions upon the proposition of reasonable doubt. Such an exception is not sufficient. The rule is that the charge must be considered as a whole. See Charles v. United States, 213 Fed. 707 (C. C. A. 4th), where it is said:

“It is well settled that a single sentence or even a lengthy paragraph in a charge cannot be treated as determining the correctness of the charge in its entirety; the proper method being to consider the charge as a whole, and if, when so considered, it appears that the court has clearly stated the law, a reversal will not be directed, even though it should appear that some portion of the same is subject to criticism.”

See also, May v. United States, 157 Fed. 1, 6, (C. C. A. 9th) and Horn v. United States, 182 Fed. 721, 740, (C. C. A. 8th); also Colt v. United States, 190 Fed. 305, 308, (C. C. A. 8th); LeMore et al v. United States, 253 Fed. 887 (C. C. A. 5th) and Peters v.

United States, 94 Fed. 127; 36 C. C. A. 105.

In any event, the court's instructions were proper and correctly stated the law. There is no such thing as an absolute certainty, out of the domain of the exact sciences and actual observation. In most cases, the guilt of the accused must, of necessity, be deduced from a variety of circumstances, leading to proof of the fact. Always, there will be room for some doubt, according to the mental powers and the whims of those who weigh the evidence. As a matter of fact, then, the question of guilt largely becomes one of probability, since it is impossible to prove it with certainty. See *Hopt v. People*, 120 U. S. 430; 7 Sup. Ct. 614. The words "moral certainty" mean no more than "a high degree of probability"; else, why use the adjective "moral"?

The instruction complained of in the case of *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 330, and which was held to be proper in an opinion written by Mr. Justice Brewer, is very similar to that complained of in the case at bar. In the Dunbar case the instruction was as follows:

"I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt; that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded. It is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as

not to exclude all doubt or possibility of error, but as to exclude reasonable doubt."

The court held that the trial court, in giving the above instructions to the jury,

" gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done. While it is true that it used the words "probabilities" and "strong probabilities", yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. *Hopt v. Utah*, 120 U. S. 430, 439, 7 Sup. Ct. 614; *Com. v. Costley*, 118 Mass. 1, 23."

The language of Circuit Judge HUNT in the case of *Crane v. United States*, 259 Fed. 480, (C. C. A. 9th), is quite in point:

"The jury was told that defendant must be proved guilty beyond a reasonable doubt; that a reasonable doubt is that state of the case which, after the entire comparison and examination of all the facts and circumstances, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. This definition was accompanied by a further instruction to the effect that the prosecution was not called upon to make a case free from any possible doubt by proving defendant's guilt to an unassailable demonstration; that such proof was rarely obtainable in dealings with human transactions, and that there is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. Defendant excepted. Surely there was no error in the statement of the court."

IV.

The remaining error alleged is that the court erred in instructing the jury that the burden was upon the defendants (plaintiffs in error) to show the registration of the still and the filing of the bond. This instruction is eminently proper, for it has long been the rule that the burden of evidence is on the defendant where the subject matter of a negative averment in the indictment or a fact relied upon by defendant as a justification or excuse relates to him personally, or otherwise lies peculiarly within his knowledge."

16 C. J. 530.

And, the language which we quote below from Faraone v. United States, 259 Fed. 507, (C. C. A. 6th), supports the rule. Faraone was convicted of carrying on the business of a retail liquor dealer without having paid the special tax required therefor by the Federal Law. In the course of the opinion, the court said:

"The government made no offer to prove the averment in the indictment that the special tax required by law was not paid, and the defendant made no reference to the subject in his testimony. It was evidently assumed by court and counsel that proof of such a negative averment is not required. The assumption was justified by the authorities and on reason. If payment had been made, the fact was peculiarly within defendant's knowledge, and he could have shown it without inconvenience. He could thereby have prevented any proceedings against him, or could have brought them to an end at any time. The subject is discussed at length in 2 Chamberlayne's Evidence, Sec. 983, with references to many cases.

See, also 1 Grenleaf on Evidence, Sec. 79 (16th Edition) and cases directly in point; Williams v. People, 121 Ill. 84, 11 N. E. 881; People v. Boo Doo Hong, 122 Cal. 602, 55 Pac. 402; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; State v. Shaw, 35 N. H. 217; Wheat v. State, 6 Mo. 455."

This point was also raised in the case of United States v. Turner, 266 Fed. 248, and in his decision overruling a demurrer to the indictment the district judge said:

"I assume that in a prosecution for transporting liquor without a permit the Government would not have to prove the want of the permit in order to make out a *prima facie* case. 16 C. J. 530; 1 Elliott Ev. Sec. 141; 4 Wigmore Ev. Sec. 2512."

See also 12 Cyc 381.

If plaintiffs in error had registered the still which they had set up, certainly that fact was peculiarly within their knowledge, and likewise, the giving of the bond, if one was given, before carrying on the business of distillers.

In any event, it is readily gathered from the instructions of the court (R. 27-28) that there was sufficient evidence before the jury to show beyond a reasonable doubt that plaintiffs in error neither registered the still nor gave the bond, because they denied all knowledge or operation of the still or any interest therein.

It is respectfully submitted that the judgment should be affirmed.

JOHN L. SLATTERY,
RONALD HIGGINS,
WELLINGTON H. MEIGS,
Attorneys for Defendant in Error.